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IN THE

Supreme Court of the United States

October Term, 1963

No. 939

HARLOW CHAMBERLIN, on his own behalf and in behalf of all other persons similarly situated,

Appellant,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

EDWARD RESNICK, PHILIP STERN, and ELSIE THORNER, in their own behalf, and in behalf of all other persons similarly situated,

Appellants,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of Florida, originally entered in this suit on January 29, 1964, which became final on February 13, 1964,

reaffirming the judgment entered by the said Court on June 6, 1962, which affirmed a final decree entered in this suit in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. We submit this jurisdictional statment to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The first opinion of the Supreme Court of Florida, dated June 6, 1962, is reported at 142 So. 2d 21. (A copy of the first opinion and judgment of the Florida Supreme Court is attached hereto as Appendix A.) The second opinion of the Supreme Court of Florida, dated January 29, 1964, is reported at 160 So. 2d 97. (A copy of the second opinion and judgment of the Florida Supreme Court is attached hereto as Appendix B.) The opinion of the Circuit Court of Dade County is reported at 17 Fla. Supp. 183. (A copy of the Circuit Court opinion is attached hereto as Appendix C.)

Jurisdiction

On April 15, 1961, the Circuit Court of Dade County issued an opinion, followed by an order, dated May 10, 1961. The Circuit Court, in part, dismissed appellants' complaints insofar as they alleged that the guarantee of religious freedom and against establishment of religion in the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, was violated by certain practices of the appellee School Board, including one practice required by a Florida

statute (Fla. Stats. 1961, Sec. 231.09), the constitutionality of which was challenged by the appellants.

On appellants' appeal, the Supreme Court of Florida, by opinion and judgment filed on June 6, 1962, affirmed the judgment of the Circuit Court. A petition for rehearing was denied on July 31, 1962.

On August 27, 1962, appellants filed in the Supreme Court of Florida their Notice of Appeal to this Court. Thereafter, the case was duly docketed in this Court (October Term, 1962, No. 520). On June 17, 1963, this Court issued its per curiam decision vacating the judgment of the Florida Supreme Court and remanding the case to that Court for further consideration in the light of *Murray* v. *Curlett* and *School District of Abington Township* v. *Schempp*, 374 U. S. 203, both decided that day.

On the remand, the Supreme Court of Florida issued its opinion and judgment on January 29, 1964, reaffirming in all respects its prior judgment of June 6, 1962. On February 20, 1964, appellants filed in the Supreme Court of Florida their notice of appeal to this Court.

Statutory and Constitutional Provisions Involved

The Florida statute (Fla. Stats. 1961, Sec. 231.09) whose constitutionality is drawn into question provides as follows:

> Duties of Instructional Personnel.—Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the county board, shall perform the following functions:
> • • •

(2) BIBLE READING.—Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment.

The First Amendment to the United States Constitution, insofar as here relevant, provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." The Fourteenth Amendment provides in part that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

The following questions are presented by this appeal:

(1) Is the Florida statute (Fla. Stats. (1961), Section 231.09) which requires the instructional staff of the public schools of the state to "Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment," invalid as being repugnant to the provisions of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, barring any "* * * law respecting an establishment of religion, or prohibiting the free exercise thereof * * *"?

(2) Are such provisions of the United States Constitution violated by any or all of the following practices of the appellee Dade County Board of Public Instruction:

(a) the regular reading of verses from the Holy Bible in assemblies and classrooms?

(b) the regular recitation of the Lord's Prayer and other religious and sectarian prayers?

(c) the conducting of religious and sectarian baccalaureate programs?

(d) the conducting of a religious census among the children to ascertain their own religious affiliations and the religious affiliation of their parents?

(e) the conducting of religious tests as a qualification for the employment of teachers?

(3) Is the above described statute or are any of the above described practices of the appellee Board of Public Instruction rendered constitutionally permissible by the fact that the appellee Board allows any pupil to be excused from Bible reading on the written request of his parent and permits any parent to request the release of his child from participating in any "non-academic activity" which he deems violative of his religious conscience?

Statement of the Case

These are two separate actions challenging the constitutionality of a variety of religious practices taking place in the public schools of Dade County, Florida. All of the appellants are parents of children attending those schools. The appellant in one action (the Chamberlin suit) is an avowed agnostic; the appellants in the other suit (the Resnick suit) are Jewish and Unitarian. The appellees are the

Dade County Board of Public Instruction and its individual members and a committee of residents of Dade County, consisting in the main of Protestant clergymen and parents of children in the public schools, who were permitted to intervene and, through their counsel, to participate in the trial as intervening defendants.

After a trial on the issues, Circuit Court Judge J. Fritz Gordon issued his decision upholding the complaint in part and dismissing it in part (Appendix, *infra*, pp. 35a-59a). In particular, Judge Gordon upheld appellants' claim that the state and federal Constitutions were violated by sectarian comments on the Bible by public school teachers, use of school premises for after-hours Bible instruction, the exhibition of religious films and the presentation of religious programs to observe Christmas, Easter and Chanuka. Accordingly, he enjoined those practices. On the other hand, he held that no constitutional principles were violated by regular reading of the Bible* and regular recitation of the Lord's Prayer and other sectarian prayers. As to the holding of religious baccalaureate programs, the Circuit Court held that there was no evidence that they included "religious teachings" (*infra*, p. 58a). On the issue of a religious census in the schools, the Circuit Court held that there was no evidence that this was a regular practice (*infra*, p. 58a). On the matter of religious tests for teachers, the Circuit Court held that this practice could not violate any right of the plaintiffs (*infra*, p. 59a).

Appellants took an appeal to the Supreme Court of Florida from those rulings of the Circuit Court dismissing

* The practice of daily reading from the Bible was in accordance with the Florida statute set forth above (pp. 3-4). The Court held the statute constitutional (*infra*, p. 51a). None of the other practices referred to were based on statute.

allegations of the complaints. The individual intervenors took an appeal from those rulings of the Court that upheld the complaints. However, the appellant Board of Public Instruction did not join in the latter appeal.

The Florida Supreme Court affirmed the lower court in all respects (*infra*, pp. 1a-29a). As to the issues raised in the appeal taken by the intervenors, the Supreme Court decided that it was unnecessary to consider those points because the School Board, by not filing a cross-appeal, had indicated its willingness to comply with the lower court's decision (*infra*, p. 27a).

An appeal was then taken to this Court from those parts of the judgment of the Supreme Court of Florida that affirmed the rulings of the Circuit Court dismissing the allegations of the complaints. As already noted, this Court vacated the judgment of the Florida Supreme Court and remanded the case to that Court for further consideration. Thereafter, the Florida Supreme Court reaffirmed its prior judgment in all respects (*infra*, pp. 30a-34a).

On the issues raised in this appeal, the record shows as follows:

1. *Bible Reading.* The complaints charged that one of the religious practices in the Miami public schools is "the regular reading of verses from the Holy Bible in assemblies and classrooms." The answer admitted this allegation. Moreover, in response to a request for admissions, the defendant Board admitted that "a version of the Bible is being read in all or most of the public schools in Dade County" (Tr. 33).* The reading is carried out pursuant to Florida Statutes, Section 231.09, set forth above.

* References are to the transcript filed on the prior appeal in this proceeding, October Term 1962, No. 520.

The Bible reading is part of a daily period in the schools generally referred to by both pupils and staff as the "morning devotional," a reflection of its distinctly religious character (Tr. 84, 100, 152, 195, 232, 285-6, 1127, 1142, 1146-7, 1157-8).

The verses to be read may be taken from the Old or New Testament (Tr. 84, 107-8, 195, 247-8, 457-60). The reading is generally from the King James version of the Bible (Tr. 33). The uncontradicted testimony establishes that the King James version, which contains the New Testament, is sectarian (Tr. 657-661, 805-9, 934-7).

2. *Lord's Prayer and Other Sectarian Prayers.* Both complaints alleged the regular recitation of the Lord's Prayer. In response to the requests for admissions, the defendant Board admitted that "a religious prayer commonly known as the Lord's Prayer is regularly recited throughout the public schools of Dade County, Florida, in the mornings coincident with the reading from the Bible" (Tr. 33).

The record shows a regular reading of the Lord's Prayer following the reading from the Bible, either over the public address system or in the individual rooms (Tr. 85, 159, 576, 1142, 1147, 1157, 1187, 1263). It is usually given in the Protestant version, that is, ending with the words "For Thine is the Kingdom," etc., which Catholics omit (Tr. 179, 198). The testimony establishes that the Lord's Prayer is sectarian (Tr. 656-7, 808-9).

Both complaints also alleged the regular recitation of "other religious and sectarian prayers." This was denied both in the answer and in the response to the requests for admissions (Tr. 33-4). Nevertheless, the uncontradicted

evidence establishes that prayers other than the Lord's Prayer are recited (Tr. 198-9, 360-2, 400-3, 1213-6).

3. *Baccalaureate Services.* Both complaints alleged the conducting of religious and sectarian baccalaureate programs. The defendant Board admitted that, at the senior high schools, "a baccalaureate program is authorized • • • at which time a minister, priest, or rabbi does appear to address the assembled students." The Board stated that attendance at the services is optional and they are not held during the regular attendance time (Tr. 36-7).

The record shows that baccalaureate programs of a religious nature are "ordinary procedure" in the schools and that some of these are held on public school property and some in churches (Tr. 462-3). The program generally consists of the playing of religious music, an invocation by a minister or a rabbi, a reading from the Bible, singing of hymns and the reciting of religious prayers, the giving of a sermon by a minister or rabbi and a benediction (Tr. 1056-7; see also 206, 1085-6). While Protestant ministers regularly appear at these services, both rabbis and Catholic priests have declined to do so (Tr. 1085-6).

The religious baccalaureate service may be combined with the graduation ceremony and the award of diplomas (Tr. 1085). Furthermore, at one high school where no class had yet graduated at the time of the trial, the school has held Award Assemblies at the end of the year at which Scholastic Awards are given (Tr. 90-1, 104-5). At these Assemblies, a minister delivers a prayer and an address or sermon (Tr. 91, 105). The student describing this ceremony stated that he was required to attend, as far as he knew, and that he had not been told that he could be excused (Tr. 91).

4. *Census.* Both complaints alleged the conducting of a religious census among the children to ascertain religious affiliations. The answer denied this allegation. However, the unambiguous and uncontradicted testimony of the County Superintendent of Schools establishes that all pupils are asked to state their religious preference when they enter the school system and that the answers become part of the permanent record of the pupil and are kept in the Board's central records (Tr. 451-2).

5. *Religious Tests.* Both complaints alleged the imposition of a religious test for teachers and other employees of the public school system and also the use of religious criteria in the employment and evaluation of teachers and other employees. The Board admitted that persons seeking teaching and other employment are required to answer a question on the application form as to whether or not they believe in God (Tr. 37). The Board policy requiring applicants to answer this question was put into effect in 1952 (Tr. 1039-40).

Religious affiliation is also considered in the promotions that are given under the "Career Increment Program" outlined in plaintiff Chamberlin's Exhibit 3. Under the heading, "Cultural Attitudes," the teacher is rated on a scale of zero to four. As to religion, a rating of 4 is given if the teacher "takes part in his own religious organizations and respects other religious beliefs." He rates 3 if "he practices a religious belief and if he takes part in his own religious organizations." If he merely "conforms to his own religious belief," he rates 1. He rates zero if his evaluation "is less than" any of the "standards described above."

6. *The Issue of Voluntary Attendance.* On June 29, 1960, three weeks before the trial of this case started, the appellee Board adopted Resolution 60-21 (Plaintiff Resnick's Exhibit 2) which reads as follows:

> WHEREAS, Section 231.09(2). Florida Statutes, provides:
>
> > "Duties of instructional personnel— (2) Bible Reading—Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment"
>
> and
>
> WHEREAS, the principals of the various schools have, for many years, been instructed to release any child from participating in the daily reading of the Bible if request for his release has been made by his parent or guardian; and
>
> WHEREAS, the Board wishes to clarify its position on these matters;
>
> NOW, THEREFORE, BE IT RESOLVED:
>
> 1. That the Bible be read daily without sectarian comment in each of the schools in the Dade County School System.
>
> 2. Any pupil shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.
>
> 3. That if any non-academic activity in the schools be deemed by a parent or guardian to be violative of the religious conscience of such parent or guardian of any child in the public school system, that such parent or guardian shall have the right to request the release of his child from participating therein, and the various principals shall grant such request, making proper provision for the orderly care of such released children.

The record shows that the excusal policy stated in this regulation does not remove the compulsion on parent and child that is inherent in the school situation. Since, as appellees insist, the policy was in effect for many years prior to its formalization in 1960, there is ample basis in the record to see how it worked in practice. The record shows that neither pupils, parents nor teachers understood or utilized the excusal policy.

Thus, pupils artlessly testified that they were required to attend their home rooms and assemblies (Tr. 84, 86, 91, 245, 484, 487). Students testified that they had never been told of any excusal policy and faculty members testified that they had not conveyed it to parents (Tr. 84, 86, 91, 162, 733, 1123-4, 1144). A number of teachers testified that they were not aware of such a policy (Tr. 1128, 1135, 1220-2), or that it had not been conveyed to the teachers (Tr. 162-3, 164, 1173-4, 1218-20). Most striking of all, parents complaining about religious practices were not told that they could ask to have their children excused (Tr. 213-4, 572-3, 603-4, 616, 644-5, 1046, 1048-9).

Finally, there is convincing and in large part uncontradicted testimony that direct requests for leave to withdraw from morning devotionals and from religious assembly programs were not honored by school personnel (Tr. 476-7, 496-7, 510-11, 752, 758-9, 763, 778-81). As to assemblies, in particular, teachers told students that their orders were "to get everyone there" (Tr. 496, 510, 763).

How the Federal Question is Presented

The federal questions here presented were first raised in appellants' pleadings before the Circuit Court for Dade County, Florida, and their claim was denied in its opinion (*infra*, pp. 35a-59a). Appellants' claims were then presented to the Supreme Court of Florida and denied in the decision of that Court (*infra*, pp. 1a-29a). They were then presented to this Court in a notice of appeal and in a jurisdictional statement (October Term, 1962, No. 520). On remand, they were reconsidered and denied by the Supreme Court of Florida in its second decision (*infra*, pp. 30a-34a).

The Questions Presented are Substantial.

The questions presented in this appeal are of direct concern to public school authorities throughout the nation. The constitutional principles involved and their application to two of the practices covered by this appeal were recently set forth by this Court in *School District of Abington Township* v. *Schempp*, 374 U. S. 203, in which it was held that the Constitution forbids readings from the Bible and the recitation of prayers as part of the exercises in a public school. That decision, in turn, was based on a number of prior decisions of this Court.

The first decision of the Supreme Court of Florida in this case was handed down before this Court's decision in *Schempp*. It was plainly basically at odds with that decision and with earlier decisions of this Court. Nevertheless, the court below adhered to its decision on remand. As we shall show, the court below has twice quite frankly rejected

this Court's interpretation of the Federal Constitution and has decided this case on the basis of its own contrary view of the First Amendment.

A. The Constitutional Principles

The principles laid down by this Court in applying the First Amendment guarantee of freedom of religion may be reviewed briefly. It is no longer open to question that, by virtue of the Fourteenth Amendment, the First Amendment, both in its "establishment" aspect and in its "free exercise" aspect is a restriction upon state action no less than federal action. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *People ex rel. Everson* v. *Board of Education*, 330 U. S. 1 (1947); *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Zorach* v. *Clauson*, 343 U. S. 306 (1952); *Engel* v. *Vitale*, 370 U. S. 421 (1962); *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963). Moreover, the scope of the restriction under the amendment upon state action is no less than upon federal action. *Everson, supra; McCollum, supra.*

In *Everson*, this Court said (330 U. S. at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, what-

> ever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

This careful exposition of the meaning of the constitutional clause has since been repeated and reaffirmed in *McCollum*, 333 U. S. at 210-211; *McGowan* v. *Maryland*, 366 U. S. 420, 443 (1961); and *Torcaso* v. *Watkins*, 367 U. S. 488, 492-3 (1961). In addition, in *Zorach* v. *Clauson*, 343 U. S. 306, 314 (1952), this Court made it clear that "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person." Finally, in *Schempp*, this Court applied those principles specifically to Bible reading and recitation of the Lord's Prayer.

This Court has also established beyond question that coercion is not a relevant factor under the Establishment Clause and that, consequently, religious activities in the public schools violate the constitutional prohibition of an establishment of religion even when individual pupils are permitted to absent themselves. This principle was stated unambiguously in *McCollum*, where this Court found it "unnecessary to consider" whether "the religious education program [involved in that case] was voluntary" (333 U. S., at 207n). It was restated and spelled out in *Engel*, which held that the fact that participation in the challenged prayer recitation by the students was "voluntary" could

not "serve to free it from the limitations of the Establishment Clause." This Court held that that Clause "does not depend upon any showing of direct governmental compulsion" and that it was not necessary to show that the challenged laws "operate directly to coerce non-observing individuals * * *" (370 U. S. at 430). The principle was reaffirmed in *Schempp*, 374 U. S. at 221.

Finally, this Court has also made it clear that religious activities in public schools cannot be defended on the ground that they are "non-sectarian." In *McCollum*, the Court found it unnecessary to reach the question whether the challenged practice of released time instruction favored one religious group over another (333 U. S. at 270n). This principle was spelled out in *Engel*, which involved a prayer that had been made as free as possible of all sectarian elements. Yet this Court held that "The fact that the prayer may be denominationally neutral" could not free it from the inhibitions of the Establishment Clause (370 U. S. at 430).

Thus, the First Amendment imposes on the states a mandate not merely of impartiality among competing faiths but also of neutrality as between religion and non-religion. As this Court said in *McCollum*: "* * * a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals. * * *" 333 U. S. at 211. The same thought was earlier expressed by the Court in the *Everson* case in its statement that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers. * * *" 330 U. S. at 18.

B. The Questions Here Presented

We submit that each of the questions raised by this appeal is substantial.

(1) Both daily reading from the Bible (questions 1 and 2a) and daily reading of the Lord's Prayer (question 2b) were clearly passed upon by this Court in the *Schempp* case, *supra*, and held unconstitutional under the First Amendment as made applicable to the states by the Fourteenth. The court below sought to distinguish this Court's ruling by referring to a preamble to the Florida statute here challenged that states that the statute was enacted "in the interest of good moral training" and to provide "lessons of morality * * *" (*infra*, p. 33a). It held that the present case could be distinguished from *Schempp* because the Pennsylvania statute and the Baltimore regulation invalidated in that decision had no such declarations, as far as this Court's opinion showed. Relying on this provision, it concluded that the statute "was founded upon secular rather than sectarian considerations" and could therefore be upheld under the doctrine of the Sunday law cases. *McGowan* v. *Maryland*, 366 U. S. 420 (1961) (*infra*, p. 33a). This very argument was made in *Murray* v. *Curlett*, the companion case to *Schempp*, where it was contended that the religious exercises had secular purposes, including "the promotion of moral values, the contradiction of the materialist trends of our times, the perpetuation of our institutions and the teaching of literature" (374 U. S. at 223). This Court rejected the argument, saying, "The short answer, therefore, is that the religious character of the exercises was admitted by the State" (374 U. S. at 224).

At the very least, the contention of the court below that the restraints imposed by the Constitution as interpreted by this Court in *Schempp* may be lifted by assigning a secular purpose to the exercises raises a substantial question appropriate for disposition on appeal to this Court. If upheld, the argument that government may employ religion as a means to effect secular ends would make the First Amendment meaningless.

(2) On the matter of the religious nature of baccalaureate and other graduation ceremonies conducted by appellees (question 2c), the evidence reviewed above (p. 9) establishes that they were manifestly "a religious activity" within the meaning of *Engel*. It should be noted that the trial court in this case dismissed this aspect of the complaints because there was no testimony "that at these programs *religious teachings* are resorted to by the rabbi, minister or priest" (*infra*, p. 58a) (emphasis supplied). The Supreme Court of Florida did not discuss this point in either of its decisions.

We submit that the Constitution prohibits not only "religious teaching" in public schools but also religious ceremonies. There was no more "religious teaching" in the Bible reading or prayer recitation dealt with in *Engel* and *Schempp* than there is in the completely religious baccalaureate services revealed by this record.

We know of no judicial decisions dealing with baccalaureate services. The one Attorney General's ruling we have found supports our view that religious baccalaureate exercises are unconstitutional. Opinion of the Attorney General of the State of Washington, April 20, 1962.

In its second decision, the Florida Supreme Court failed to consider whether the principles laid down in *Schempp* applied to the issue of religious baccalaureate services (or to the religious census or religious tests for office), saying only that those issues were not involved in *Schempp* "and nothing therein requires a change of our views as expressed in our opinion rendered in June, 1963" (*infra*, p. 32a). That is the whole extent of its discussion of the constitutional issues raised by these three questions.

As to baccalaureate services, however, the court below went on to say that the plaintiffs had no standing to sue because baccalaureate services are conducted only in the high schools and none of the plaintiffs' children were high school students (*infra*, p. 32a). The facts as of the time testimony was taken on this point in July, 1960, were as follows: The plaintiff Chamberlin had three children in the public schools, aged 7, 10 and 15. The five children of the other three plaintiffs ranged in age from five and one-half to nine. All were attending elementary school except the oldest Chamberlin child who had been enrolled in the junior high school (Tr. 10, 39, 56, 109).

Since then, almost four years have elapsed and, of course, these proceedings are still not terminated. The oldest Chamberlin child has presumably been graduated from high school with a consequent abatement of the rights asserted in this proceeding. The second child is presumably about to enter high school. As the course of this litigation shows, there is no assurance that a final decree will be entered in the near future and there is no reason to believe that even the youngest child may not be approaching high school years when these proceedings end.

Moreover, it is clear that any ruling that may be issued on the propriety of religious baccalaureate services would eventually affect all of the plaintiffs' children except those who have already graduated from high school. Hence, the three cases cited by the court below (*Poe* v. *Ullman*, 367 U. S. 497, 503-504 (1961); *Tileston* v. *Ullman*, 318 U. S. 44 (1943); *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531 (1941)) (*infra*, p. 32a) have no application here. In none of those cases was there any reason to believe that the persons raising constitutional issues would at any time in the future be injured by the challenged practices.

The rule applied by the court below might well prevent any test of even the most clearly improper practices in public school graduation ceremonies. This Court has held that it will not pass on the propriety of practices in public schools when the pupil on whose behalf the constitutional claim is raised has left school, even if he was a pupil at the time the suit was started. *Doremus* v. *Board of Education*, 342 U. S. 429 (1952). In view of the normally prolonged nature of constitutional litigation, a ruling limiting the right to challenge religious baccalaureate services to members of the graduating class would in effect place such services beyond the reach of the judicial process.

In sum, the threatened injury to appellants is "not a mere possibility in the remote future" and judicial relief at this time is appropriate lest "the injury * * * become irreparable." *Pierce* v. *Society of Sisters*, 268 U. S. 510, 536 (1925).

(3) On the question of a religious census (question 2d), the record shows that the religion of each child is determined on his enrollment and that that information becomes

a part of his file (*supra*, p. 10). We submit that appellants' claim that this practice is unconstitutional is clearly substantial.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion *or force citizens to confess* by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943) (emphasis supplied).

The First Amendment requires of the states more than mere neutrality on religion. It rests on the assumption that religion is not a matter of governmental concern. "The state has no *concern with* or control over the religious faith or belief of a citizen." *Gerhardt* v. *Heid*, 267 N. W. 127, 134 (1936). See also *People ex rel. Giffin* v. *Steele*, 2 Barb. (N. Y.) 397 (1848); *State ex rel. Freeman* v. *Scheve*, 65 Nebr. 853 (1902). These decisions flow inevitably from Madison's position that "religion is wholly exempt from * * * cognizance" by civil authorities. Madison's *Memorial and Remonstrance Against Religious Assessments*, annexed as an appendix to *Everson* v. *Board of Education*, *supra*.

In its second opinion, the Florida Supreme Court concluded that appellants had no standing to challenge the religious census because there was no evidence that their children had been questioned (*infra*, pp. 32a-33a). According to the uncontradicted testimony of the Superintendent of Schools, the central records of the Board show "the religious preference of the various children in the school," information which is obtained when the child enters school

(Tr. 451-452). There is no reason to believe that special exceptions to this rule were made for appellants' children.

The court below also noted that the information concerning religion obtained from each child was "for the use of the professional personnel and was not made public" (*infra*, p. 33a). No effort was made to explain the relevance of this fact.

Finally, the court below stated that this information was obtained in order to determine probable attendance over religious holidays (*infra*, p. 33a). There is no evidence in the record to support this statement. Even if it were true, questioning of all children concerning their religion is manifestly an improper way of determining attendance on religious holidays. There is no reason why the sch officials should go beyond the obvious step of asking pupils whether they will be absent.

(4) On the issue of the conducting of religious tests as a qualification for the employment of teachers (question 2e), the record establishes plainly that applicants for teaching positions are required to answer the question, "Do you believe in God?" and that religious attitudes are considered in making promotions. These practices are unconstitutional. *Torcaso* v. *Watkins*, 367 U. S. 488 (1961).

The trial court dismissed this aspect of the complaint on the ground that the challenged practices did not violate any constitutional right of the appellants since none of them was a teacher (*infra*, p. 59a). The Supreme Court of Florida in its second opinion also relied on this argument (*infra*, p. 33a).

In *Barrows* v. *Jackson*, 346 U. S. 249, 255 (1953), this Court summarized the decisions on this point by saying:

> The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.

We submit that appellants can show such injury.

The selection and promotion of teachers on the basis of religion is manifestly not an idle act. It must be presumed that the appellee school officials follow this practice with a view to its effect on what is taught in the schools they administer. This has a direct effect on the pupils in those schools, an effect that their parents have a right to challenge.

In a similar situation, the Courts of Appeals for the Fourth and Fifth Circuits have entertained suits by parents of children in public school challenging segregation and discrimination because of race in the selection and assignment of teachers in the schools their children attend. *Jackson* v. *School Board of Lynchburg*, 321 F. 2d 230 (C. A. 4, 1963); *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862 (C. A. 5, 1962); *Board of Public Instruction of Duval County* v. *Braxton*, —— F. 2d —— (C. A. 5, 1964). We submit that suits should similarly be allowed where the discrimination in the selection of teachers is based on religion.

The doctrine that bars judicial consideration of the constitutional rights of others "is only a rule of practice." *Barrows* case, *supra*, at 257. It was and has been overborne by the equities of specific cases, as in *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485 (1952), in which this Court upheld the constitutionality of the New York State Feinberg Law, which made membership in or-

ganizations found to be subversive *prima facie* evidence of disqualification for employment as public school teachers. Justice Frankfurter, in a dissenting opinion, noted that the plaintiffs in the case were teachers, taxpayers and parents and argued that the appeal should have been dismissed because none of these three groups had a sufficient interest to challenge the Law (342 U. S., at 501-505). As to the parents, Justice Frankfurter specifically argued that it made no difference that they "may dislike to have children educated in a school room where teachers feel restrained by unconstitutional limitations on their freedom" (342 U. S. at 502). Nevertheless, a majority of this Court did not question the standing of any of the plaintiffs and decided the case on the merits.

Pierce v. *Society of Sisters, supra,* represents the opposite side of the coin. There, a private school was permitted to rely on the constitutional right of parents "to direct the upbringing and education of children under their control" (268 U. S. at 534-5).

This Court has also taken into account the fact that, unless suit is entertained, "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows* case, *supra,* 346 U. S. at 257. See also *NAACP* v. *Patterson,* 357 U. S. 449, 448-460 (1958). We submit that that consideration is applicable here also. It would be unrealistic to expect a person seeking a position with a school system to institute a legal proceeding challenging the propriety of a question on the application form he was asked to sign. Even less likely is any action by a teacher already on the staff challenging the standards used for promotions.

We submit, therefore, that the appellants here have standing to invoke the judicial process to terminate these plainly unconstitutional practices.

(5) Throughout these proceedings, appellees have urged that the religious practices in the public schools that we challenge are rendered constitutionally immune by the fact that parents may have their children excused from participation (question 3). The court below relied on that fact in its first opinion (*infra*, pp. 16a-17a), but made no reference to it in its second.

This contention was decisively disposed of in *Engel* and *Schempp*. As we have seen, this Court has repeatedly held that "the Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion" (*Engel* case, *supra*, 370 U. S. at 430; *Schempp* case, *supra*, 374 U. S. at 221, 223). It is therefore unnecessary for us to refer in detail to the ample evidence in the record showing that the practices were in fact compulsory (*supra*, pp. 11-12), or that the classroom situation necessarily inhibits free choice (Tr. 823, 865, 917, 928-30, 946, 953-5). On the coercive effect of the classroom situation, see Justice Frankfurter concurring in the *McCollum* case, *supra*, 333 U. S. at 227; *Engel* case, *supra*, 370 U. S. at 430; *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 199-200 (1890); *Knoulton* v. *Baumhover*, 182 Iowa 691, 699-700 (1918); *Tudor* v. *Board of Education*, 14 N. J. 31, 48-50, 100 A. 2d 857 (1953), cert. denied, 348 U. S. 816 (1954).

C. The Decision Below

The Florida Supreme Court, we submit, has twice decided the issues in this case in a manner totally inconsistent with the decisions of this Court described above.*

Thus, in its first decision, after quoting in full the definitive and often-repeated interpretation of the Establishment Clause by this Court in *Everson*, set forth above, the court below said (*infra*, p. 6a):

> We are not impressed with the language quoted as being definitive of the "establishment" clause. It goes far beyond the purpose and intent of the authors and beyond any reasonable application to the practical facts of every day life in this country. We feel that the broad language quoted must, in the course of time, be further receded from, if weight is to be accorded the true purpose of the First Amendment.

It said further (*infra*, p. 15a):

> It is beyond the realm of possibility for this court to reconcile our conception of the First Amendment with the too broad language of the several decisions relied upon by the plaintiffs.

In its second decision, the court below made no effort to measure the Florida Bible reading statute or the challenged practices against the criteria laid down in the *Schempp* decision. Instead, it simply asserted its conclusion that the statute "was founded upon secular rather than sectarian

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* If this Court concludes that this appeal was improvidently taken under 28 U. S. C. 1257(2) and, in accordance with 28 U. S. C. 2103, treats the appellants' papers herein as a petition for writ of certiorari, there will be ample basis for granting the petition on the ground that the Florida Supreme Court has here "decided a federal question of substance * * * in a way probably not in accord with applicable decisions of this court." Rules of the Supreme Court, Rule 19.

considerations and is to be construed as was the Sunday Closing Law in the *McGowan* case" (*infra*, p. 33a). In refusing to apply *Schempp*, it not only relied on a factual distinction rejected in *Schempp* (*supra*, p. 17) but also on "our conviction that the establishment clause of the Constitution was never designed to prohibit the practices complained of * * *" (*infra*, p. 34a).

The Florida Supreme Court appears to have misconceived both the nature of the federal-state relationship and the purpose of constitutional guarantees designed to guard against abuse of governmental powers.

Conclusion

The federal questions presented by this appeal are substantial and of public importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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March, 1964

APPENDIX A

(Opinion Filed June 6, 1962)

IN THE

SUPREME COURT OF FLORIDA

January Term, A. D. 1962

Case No. 31,545

HARLOW CHAMBERLIN, on his own behalf and in behalf of all other persons similarly situated,

Appellant,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

Case No. 31,546

EDWARD RESNICK, PHILIP STERN, and ELSIE THORNER, in their own behalf, and in behalf of all other persons similarly situated,

Appellants,

vs.

THE DADE COUNTY BOARD OF PUBLIC INSTRUCTION, *et al.*,

Appellees,

vs.

DAVID HUME, *et al.*,

Intervening Appellees.

CALDWELL, J.

These two cases are here upon direct appeal from a final decree of the circuit court of Dade County construing